

BOOK REVIEW

CONTROLLING CONFLICT: ALTERNATIVE DISPUTE RESOLUTION FOR BUSINESS

By Edward J. Costello, Jr.
Chicago; CCH Incorporated, 485 pp.

*Reviewed by Kimberlee K. Kovach**

The primary purpose of Edward J. Costello's *Controlling Conflict: Alternative Dispute Resolution for Business*, appears to be the education of business people about alternatives to the litigation process for dispute resolution. As such, it is timely and pertinent, as many businesses have litigation cost control at the forefront of their concerns. The importance of alternative dispute resolution (ADR) to the business community is clear, and Costello not only does a capable job of educating the reader, but accomplishes it in an enjoyable fashion.

The book is quite comprehensive, which is commendable in terms of providing an overview of the entire ADR universe. On the other hand, the extensiveness of content is debatable in that it might, for an ADR novice, be overwhelming and confusing, particularly as he delves into detail about international dispute resolution procedures. Overall, however, the book provides a fine contribution to the ADR field and can serve as a solid reference for business people.

Strong points include the lists of practical material such as the Negotiation Guideposts;¹ Six Reasons Lawyers Give For Not Using Mediation and Why They Are Wrong;² and Questionnaire for Prospective Arbitrators.³ Issues to consider when evaluating whether to participate in ADR, as well as choosing a specific process are also quite helpful. The information on arbitration is quite comprehensive, accurate and explicitly set out. I also found the inclusion of appropriate cartoons at the beginning

*Kimberlee K. Kovach teaches ADR and directs a Mediation Clinic at the University of Texas School of Law. She currently serves as the Chair of the ABA Section of Dispute Resolution.

¹ See EDWARD J. COSTELLO, JR., *CONTROLLING CONFLICT: ALTERNATIVE DISPUTE RESOLUTION FOR BUSINESS* 53-56 (1996).

² See *id.* at 73-75.

³ See *id.* at 111-112.

of each chapter a welcome diversion as were the refreshing quotes. Many of the chapters were quick, easy reads, that is, concise, well written and to the point. However, at other times, I found some of the material perplexing. I was unable to ascertain the basis of his decisions when to include detail as opposed to merely skimming the surface of a subject. For example, while the arbitration process received extensive treatment, the scope of neutral evaluation, although helpful, was limited. The book also included a thirteen page discussion of the mini-trial⁴ and yet relegated the Summary Jury Trial to little more than a footnote. If the book is about ADR processes, then the reader should at least be provided with an understanding of why some of the procedures are given more in-depth attention than others. While I understand why one might be inclined to focus primarily on two or three primary processes, an explanation would be helpful.

Another potential shortcoming was the attempt at integrating some historical, philosophical and legal parameters of ADR with the more practical, user-friendly approach which permeates much of the text. Perhaps it was by design, but in doing so, some of the value of the pragmatic became lost in the treatise-like style. Although somewhat distracting, it is, however, not a fatal flaw, as the style of writing is, for the most part, conversational, and the examples quite helpful.

I am also compelled to note the glossary of terms, which contains a few definitions which are incomplete or inaccurate and therefore potentially misleading. Glossaries can be quite helpful, and it is admirable that Costello provides one. But if inaccurate, definitions may mislead or confuse the reader, particularly those who are new to ADR. While admittedly overly vigilant about the definition of mediation⁵ along with the ADR other processes, I believe that definitions are quite important with regard to distinguishing the ADR processes, especially as the field of ADR remains in a developmental stage, and people are introduced to it for the first time. Consequently, and even though there remains debate about the precise meaning of mediation and what essentially the mediator's role in particular

⁴ See *id.* at 147-159.

⁵ See generally Kimberlee K. Kovach, *What is Real Mediation, and Who Should Decide?*, DISP. RESOL. MAG., Vol. 3, No. 2, 1996, at 5; Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217 (1995).

entails,⁶ the definition of mediation which presumes the private caucus format is troublesome.⁷ Another example is the definition of "court-annexed" which is defined as available through a court system. This is misleading in that often cases are referred to private ADR providers outside of the court system, but because the matter involves pending litigation, the processes are termed "court-annexed" or court connected. On the whole, however, Costello does a admirable job of furnishing the reader with a solid foundation of ADR knowledge.

The book begins with an examination of business disputing and the contextual role of law and the courts. For the most part, these chapters present an accurate, though perhaps oversimplified description of litigation. Although they likely would not find favor among litigators, judges and court administrators, for the purpose intended, that is demonstrating problems inherent in litigation, the picture is a good backdrop upon which to then formulate the ADR universe and its various offerings, in contrast to the traditional win-lose paradigm.

Costello then moves into the substance of ADR, presenting first an overview, followed by separate chapters for each of the following ADR processes: Negotiation, Mediation, Arbitration, Private Judging, Mini-Trial, Early Neutral Evaluation and Hybrids. While for the most part, the substance is accurate, educational and presented in an entertaining fashion, a few matters end up confusing. For example, in the ADR overview chapter, he lists the types of matters which are appropriate for ADR, and specifically excludes criminal matters.⁸ Yet, later in the text, he includes information about criminal cases in the chapter on mediation, although he mistakenly limits it to only misdemeanors.⁹ Many of the first community mediation programs had their genesis in the criminal context.¹⁰ While it is

⁶ See Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOTIATION L. REV. (1998) (forthcoming May 1998); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 23 (1996).

⁷ See also *infra* notes 14-17 and accompanying text.

⁸ See COSTELLO, *supra* note 1, at 25.

⁹ See *id.* at 72.

¹⁰ For example, the Columbus, Ohio City Attorney's Office, along with Capital University School of Law, sponsored one of the very first mediation programs, The Night Prosecutor's Program. This project, under a grant from the Department of Justice, Law Enforcement Assistance Administration, was initiated in 1971. Moreover, some of the other Neighborhood Justice Centers, initiated in 1976 and after, also had

expected that a book aimed at business would have little focus on criminal disputing, the potential for business use does exist. For example, business people may be victims of white collar crime. There are likely other matters where the offender and the victim (the company) may be willing to mediate, commonly where restitution is appropriate. The use of mediation in criminal matters is increasing, particularly when focused on restitution.¹¹

One very delightful inclusion is the variation on the traditional story of the orange.¹² Costello relates a different approach to the story, one which not only goes to ascertaining the parties interests, but moves a step or two further, into establishing collaborative long term relationships.¹³ These examples illustrate for the reader the variety and creativity inherent in both interest-based problem solving negotiation as well as mediation, thereby demonstrating one of the greatest values of these processes. Another excellent inclusion is the Guideposts for Negotiation, found in Chapter Five, which provide the reader with concise, significant pointers applicable in almost any negotiation. My only dilemma with the negotiation treatment involves the inclusion of the cross cultural aspects. While important, particularly in this time of the global economy, my confusion results not from what is included, but rather from what is not. Costello provides a fine overview of negotiation perspectives from Korea, Japan, China and the Arab Nations, as he similarly does when discussing International ADR specifically. And yet, I am unable to determine why other countries, such as European and South American countries, are not included.

their genesis within or as adjunct to the criminal justice system. *See generally* DANIEL MCGILLIS, *NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS* (U.S. Department of Justice 1977); Kimberlee K. Kovach & Marsha L. Merrill, *Community Dispute Resolution Centers*, in *HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION* (Amy L. Greenspan ed., 2d ed. 1990).

¹¹ *See* Mark S. Umbreit, *Mediation of Victim Offender Conflict*, 1988 J. DISP. RESOL. 85; Stephen Woolpert, *Victim-Offender Reconciliation Programs* in *COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS* 275 (Karen Grover Duffey et al. eds., 1991). However, there is some criticism of the use of mediation in the criminal system. *See generally* Jennifer Gerarda Brown, *The Use of Mediation To Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994).

¹² *See generally* ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991).

¹³ *See* COSTELLO, *supra* note 1, at 32-33.

Costello then moves from direct negotiation into a discussion of the mediation process, acknowledging mediation as an extension of negotiation. Although the chapter, on the whole, contains a fairly good explanation of the mediation process, along with pointers for participation, one concern is with the automatic assumption of the caucus or private meeting portion of mediation. This description could be confusing or inaccurate depending upon the jurisdiction in which the reader may be mediating. As mediation use has developed in the United States, it has done so in a variety of settings, ranging from labor and collective bargaining matters,¹⁴ to the civil justice system,¹⁵ to community based centers where volunteers assisted parties to a dispute in reaching a mutually satisfactory resolution.¹⁶

The primary work of mediators consists of the facilitation of communication, understanding and the search for mutually beneficial solutions to problems. Many times, particularly where the parties know each other, and even more importantly where there will be an ongoing relationship, such as in business or employment settings, it is often desirous to keep the parties together for as much of the mediation as possible. Often a mediator must meet privately with the parties to discover additional information, since it has been noted that parties are more likely to disclose information when meeting in private.¹⁷ At the same time, however, competing issues arise. Where the possibility of a continuing relationship exists, and particularly if it is paramount, then joint problem solving is often a better approach, as the parties will learn how to problem solve on their own. I also found Costello's reference to styles of mediation as either facilitative or directive¹⁸ misleading at best. While, admittedly, Costello is not the first person to use the terms interchangeably, that is, to define a

¹⁴ See generally WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* (2d ed. 1986).

¹⁵ For a more detailed discussion of the historical development of mediation within the civil justice system, see NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, AND PRACTICE* §§ 5:01-5:04 (2d ed. 1994).

¹⁶ For detail on the development of Community Mediation Centers, see Edith B. Primm, *The Neighborhood Justice Center Movement*, 81 KY. L.J. 1067 (1992-1993). See also COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS 137 (Karen Grover Duffey et al. eds., 1991).

¹⁷ See Neil B. McGillicuddy et. al., *Factors Affecting the Outcome of Mediation: Third-Party and Disputant Behavior* in COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS, *supra* note 16.

¹⁸ See COSTELLO, *supra* note 1, at 83.

facilitative mediator¹⁹ as one who is essentially nondirective,²⁰ many of us who espouse a facilitative orientation for mediators would contend that nothing (well, almost) could be further from the truth.²¹ A mediator with a facilitative orientation, will nevertheless be directive, pushing the parties to confront the issues and to consider alternative solutions. The defining line is that the mediator does not provide an evaluation—such is within the province of the neutral case evaluation processes.²²

On the other hand, Costello does a good job at emphasizing the creative aspect of mediation. This perspective of mediation is often ignored; yet the ability to fashion specifically patterned solutions is probably one of the most beneficial qualities of mediation and one which also provides the greatest opportunity for party participation and therefore satisfaction.

While Costello includes a discussion of the parties' opening statements as well as other aspects of mediation procedure, one critical factor not sufficiently highlighted, in my opinion, is the nonadversarial nature of the mediation process—at least as compared to adversarial nature of trial and arbitration. This is important, since the lawyer's conduct at mediation, if adversarial and confrontive, can undermine the process. Because mediation should not be considered as part of a win-lose paradigm of dispute resolution, I have contended that lawyers should be non (or at least less) adversarial.²³ Since this book is written for business disputing, it presents the opportunity to inform business executives that lawyers' conduct at

¹⁹ I would contend that the term facilitative mediator is redundant. See Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation is An Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31, 31 (1996).

²⁰ See John Lande, *How Will Lawyering and Mediation Practices Transform One Another?*, 24 FLA. ST. U. L. REV. 839, 849-853 (1997).

²¹ See generally Kovach & Love, *supra* note 6.

²² See *infra* notes 29-30 and accompanying text.

²³ See Kimberlee K. Kovach, *Good Faith in Mediation-Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 604 (1997) (outlining the contention that since mediation is a less or nonadversarial process, there should be a requirement of good faith participation in the process); see also Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Post Modern, Multicultural World*, 38 WM. & MARY L. REV. 5, 6-8 (1996) (outlining the difficulty of some cases to reach a "win-lose" or "right-wrong" result). But cf. David Hricik, *Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me*, 38 S. TEX. L. REV. 745, 750-751 (1997) (addressing the concern for disclosure in mediation); Edward F. Sherman, *'Good Faith' Participation in Mediation: Aspirational, Not Mandatory*, DISP. RESOL. MAG., Winter 1997, at 14.

mediation may be different than what is appropriate in a more adversarial process, such as trial. This is a significant point, since client expectations often influence lawyer conduct. If the client expects that the lawyer will not be a gladiator, but rather is present to assist in the mediation process, it is more likely that a mutually beneficial and agreeable solution will be achieved.

It is the discussion, however, of neutral case evaluation that is most bothersome. To Costello's defense, his treatment of the matter is legitimate based upon most of the texts and writings examining the ADR processes, where any reference to neutral case evaluation is only to *early* neutral evaluation (ENE).²⁴ Yet, many times a neutral evaluation of the merits of a case can assist in achieving settlement *at any time* during a pending lawsuit—even after the case is on appeal.²⁵ It is important that neutral case evaluation be distinguished and preserved as separate from mediation,²⁶ and that parties, lawyers and courts have a better understanding of all processes.²⁷

ENE began as essentially a hybrid between a case management tool and settlement process,²⁸ and Costello is correct in that the ENE program has a broad and varied focus. However, ENE is not the only case evaluation process. In looking at a variety of ADR processes, both state and federal courts recognize that more generic neutral case evaluation is another option. For example, the Texas ADR Act²⁹ provides the courts the authority to refer cases to the Moderated Settlement Conference, a neutral case evaluation procedure, and the Superior Court in Washington D.C.

²⁴ See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 5-6 (2d. ed. 1997). See generally FRANK E.A. SANDER ET AL. *DISPUTE RESOLUTION* (1992).

²⁵ See *J.B.J. Distributors, Inc. v. Jaikaran*, 744 S.W. 2d 379, 380 (Tex. Ct. App. 1988).

²⁶ See generally Kovach & Love, *supra* note 6.

²⁷ See Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1538 (1994) (analyzing the Early Neutral Evaluation (ENE) program in the Northern District of California over a four year period and pointing out specifically the need for specificity in processes).

²⁸ See *id.* at 1489, 1496.

²⁹ TEX. CIV. PRAC. & REM. CODE ANN. § 154.001 *et. seq.* (West 1998).

included neutral case evaluation as one of three options in its Multi-Door Courthouse Program.³⁰

Costello's treatment of Med-Arb as well as the hybrid processes is likely sufficient for the business person. The specific focus on selection of an ADR program is quite comprehensive and well set out. The sample forms are well worthwhile and serve as a good resource for participants including neutrals.

The book concludes with some extensive discussion of ADR in the international sphere, and as mentioned briefly in early chapters, is limited. While Costello does an excellent job of covering the variations in cultures and their relationship to ADR processes, I fail to understand why the focus is entirely on the Asian countries, with no reference at all to Europe or Central or South America. Although I understand that a complete comprehensive review of the world of ADR in general is beyond the scope of the book, a minimal explanation would have helped understand the entire spectrum. Finally, the Appendices are comprehensive, though focused primarily on arbitration and private judging, with some inclusion of mediation.

In essence, Edward J. Costello's *Controlling Conflict: Alternative Dispute Resolution for Business* provides a very comprehensive review of the overall ADR universe for the novice. Its emphasis on, and direct application to business, sets it apart from other similar books. The international applications, which are important in this day and age of global economy, are also unique, not usually found in a general ADR book such as this. The book also includes numerous examples and stories, which are not only educational and helpful, but also make the book entertaining and enjoyable reading.

³⁰ See generally MICHAEL FIX & PHILIP J. HARTER, *HARD CASES, VULNERABLE PEOPLE: AN ANALYSIS OF MEDIATION PROGRAMS AT THE MULTI-DOOR COURTHOUSE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA* (1992).